

Dear Anad,

Re: LE Osman

I am writing to confirm the position with regard to the fees of the government of Hong Kong in connection with the first habeas corpus application.

The full sum due as taxed is £109,065.23, to which must be added interest at the rate of 15% pa from the date of the order, being 11 May.

I therefore calculate that in addition to the sum of £109,065.23, interest of £32,720 will be payable on the basis that payment is made within the next days. The taxation certificate has not yet been received by me.

Kind regards,

Yours sincerely,

Sgd

Jeffrey D Walton

The fifth and sixth letters quoted above relate to the taxed costs due to the Hong Kong government. According to the sixth letter the taxed costs was in respect of the first habeas corpus application.

From Lorrain's affidavit and from the third letter exhibited to Mr Anad Krishnan's affidavit I find that Lorrain has a pressing need to instruct his solicitors in respect of the fourth habeas corpus application which is due for hearing on 11 June 1990. I also find that he urgently needs funds for his legal expenses in respect of his case in the European Commission for Human Rights. In my opinion it is appropriate for Lorrain to ask this court to allow him to use his assets within jurisdiction to pay for the amount asked for. To deny him to use his assets for this purpose may amount to denying him of proceeding with the fourth habeas corpus application and with the European Commission for Human Rights. Both cases involve the question of Lorrain's liberty.

With regard to the rest of the money applied for by Lorrain, I find that Lorrain has not discharged the burden of proof, the onus of which rests on him. The court, therefore, cannot allow the application in the absence of such proof.

For the reasons stated above I order that Lorrain's application to dissolve the Mareva injunctions be dismissed. With regard to the alternative prayer, I order that Lorrain is only allowed to take from his assets in Malaysia in the sum of £50,000 for the purpose of the fourth habeas corpus application and for the European Commission of Human Rights. The costs of this application shall be costs in the cause.

Order accordingly.

Solicitors: *Skrine & Co; James Foong & Anad.*

Reported by *PS Ranjan*

A Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd

HIGH COURT (PENANG) — ORIGINATING SUMMONS

NO 24-209-89

MOHAMED DZAIDIN J

25 MAY 1990

B *Land Law — Order for sale — Application for — Whether applicant entitled by virtue of subrogation of registered chargee's rights — National Land Code 1965, ss 219, 242, 243 & 256*

C This is an application by the plaintiffs for an order for sale under s 256 of the National Land Code 1965 in respect of a piece of property known as plot 39, section 4 Bandar Butterworth, Seberang Perai Utara bearing title HS(D)63 ('the said property'). The application is founded on the plaintiffs' claim to be subrogated to the rights of Citibank NA, the registered chargee of the said property. The crucial issue was whether the plaintiffs who stepped into the shoes of Citibank NA by subrogation can obtain an order for sale under s 256 of the National Land Code 1965 despite not being the registered chargee of the said property.

D *Held*, dismissing the plaintiffs' application:

E (1) The plaintiffs had stepped into the shoes of Citibank NA after they had paid off the latter the full sum owed by the defendants which was secured by the said charge. The defendants went on to execute a fresh charge in favour of the plaintiffs which could not be registered. The charge documents together with the issue document of title and a discharge of charge remained in the possession of the plaintiffs and they had thus become an equitable chargee of the said property.

F (2) Whilst on the one hand, the National Land Code 1965 does not prohibit the creation of an equitable charge, the Code, being a complete and comprehensive code of law governing land, on the other hand, clearly requires the charge to be registered in its prescribed form before a chargee can enforce his right of foreclosure under the Code.

[Bahasa Malaysia Summary]

G Ini adalah satu permohonan oleh pihak plaintif untuk perintah jualan di bawah s 256 Kanun Tanah Negara 1965 terhadap suatu harta tanah yang dikenali sebagai plot 39, seksyen 4 Bandar Butterworth, Seberang Perai Utara dengan hakmilik HS(D) 63 ('harta tanah itu'). Permohonan ini berasaskan tuntutan pihak plaintif bahawa mereka disubrogasi kepada hak Citibank NA, pemegang gadaian yang berdaftar bagi harta tanah itu. Isu yang penting ialah samada pihak plaintif yang mengambil tempat Citibank NA secara subrogasi boleh memperolehi satu perintah jualan di bawah s 256 Kanun Tanah Negara 1965 meskipun bukan pemegang gadaian yang berdaftar bagi harta tanah itu.

H *Diputuskan*, menolak permohonan pihak plaintif:

I (1) Pihak plaintif telah mengambil tempat Citibank NA setelah mereka membayar Citibank jumlah penuh hutang defendan yang dicagar dengan gadaian itu. Defendan kemudiannya telah membuat gadaian yang baru bagi pihak plaintif yang tidak dapat didaftar. Surat-surat gadaian bersama dokumen hakmilik keluaran dan surat pelepasan gadaian tetap di dalam milik pihak plaintif dan lantaran itu mereka menjadi pemegang gadaian ekuiti harta tanah itu.

(2) Walaupun pada satu belah, Kanun Tanah Negara 1965 tidak melarang pewujudan gadaian ekuiti, Kanun itu yang merupakan kanun yang penuh dan lengkap bagi undang-undang tanah, pada

belah yang lain, jelas menghendaki gadaian itu didaftar dalam bentuk yang ditetapkan sebelum seseorang pemegang gadaian boleh melaksanakan hak 'foreclosure' di bawah Kanun itu.]

Cases referred to

- 1 *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 (folld)
- 2 *Standard Chartered Bank v Yap Sing Yoke & Ors* [1989] 2 MLJ 49 (refd)
- 3 *United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 (folld)

Legislation referred to

National Land Code 1965 ss 219, 242, 243, 256

Charles Ong Chye Lee for the plaintiffs.

Chong Heang Kin for the defendants.

Cur Adv Vult

Mohamed Dzaidin J: This is an application by the plaintiffs for an order for sale under s 256 of the National Land Code 1965 in respect of a piece of property known as plot 39, Section 4 Bandar Butterworth, Seberang Perai Utara bearing title HS(D)63 ('the said property') belonging to the defendants. The application is founded on the plaintiffs' claim to be subrogated to the rights of Citibank NA, the registered chargee of the said property.

The facts giving rise to this application are these. On 26 July 1982, the defendants executed a first legal charge ('the said charge') of the said property in favour of Citibank NA to secure a loan of \$200,000 granted by the bank to them. The said charge was duly registered as presentation No 5281/80 Jilid 26 Folio 37. Sometime at the end of 1987, the defendants approached the plaintiffs for a loan of \$200,000 to settle the debt owing to Citibank NA and thereby to discharge the said charge and to create a fresh charge in favour of the plaintiffs. Accordingly, the plaintiffs agreed to the defendants' request and upon payment made to Citibank NA on behalf of the defendants towards settlement of the outstanding loan, both the discharge of charge and a fresh charge in favour of the plaintiffs were executed by Citibank and the defendants respectively. The plaintiffs were then in possession of the issue document of title and the charge documents. However, when the charge documents were presented for registration at the Land Office, Butterworth, they could not be registered because of the existence of a private caveat lodged by a director of the defendant company.

Subsequently, the defendants were in default of the repayment of their loan with the plaintiffs and by two notices of demand dated 18 August 1988, the plaintiffs' solicitors demanded from the defendants payment of the outstanding principal sum and interest. Despite such notices, the defendants had failed or neglected to pay the outstanding sum. On 15 September 1988, the plaintiffs issued a writ of summons in Penang High Court Civil Suit No 134 of 1988 against the defendants and one Tan Chin Kek, a director of the defendants who guaranteed the said

A loan. In the statement of claim, the plaintiffs prayed for the following orders:

- (a) a declaration that they are entitled to be subrogated to the rights of Citibank NA under the said charge;
 - (b) a declaration that the title deed to the charged property in their hand stand charged with the payment of \$218,508.75 and interest;
 - (c) as against the second-named defendant the removal of the private caveat lodged by him;
 - (d) an order pursuant to s 257 of the National Land Code 1965;
 - (e) such further or other orders;
- C (f) costs.

The above writ and the statement of claim were duly served on the defendants. On 30 January 1989, pursuant to the plaintiffs' application for leave to enter judgment in default of appearance against the defendants, this court gave judgment for the plaintiffs and granted the following orders:

- D (a) the plaintiffs are entitled to be subrogated to the rights of Citibank in respect of the said charge;
- (b) the title deed to the charged property in the hands of the plaintiffs stand charged with the payment of \$218,508.75 with interest;
- E (c) that the second-named defendant do remove the private caveat lodged on 27 March 1987 on the said property;
- (d) costs.

Consequent to the aforesaid judgment in default, the plaintiffs filed this originating summons under s 256 of the National Land Code 1965. It is trite that on an application by a chargee of any land, the court will grant an order for sale unless it is satisfied of the existence of cause to the contrary under sub-s (3) of s 256. Hence, the defendants, whose duty is to show 'the existence of cause to the contrary', relied on the affidavits of Chua Gim Suan alias Chai Chong Chin affirmed on 22 September and 2 November 1989 respectively. F The material issue raised therein was on the question of the plaintiffs not being the registered chargee of the said property. This point was, in fact, amplified by Mr Chong Heang Kin, counsel for the defendants, who submitted that the plaintiffs not being the registered chargee of the charged property could not avail themselves under the National Land Code 1965 to enforce any right under s 256. G Encik Charles Ong, on the other hand, for the plaintiffs, submitted that in view of the court order granting the plaintiffs to be subrogated to the rights of the Citibank NA, and the defendants having executed a fresh charge in favour of the plaintiffs, the plaintiffs became the equitable chargee of the said property and could thus make this application and be granted the order for sale. Counsel cited *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd*¹ and *Standard Chartered Bank v Yap Sing Yoke & Ors*² for the proposition that our courts recognize an equitable charge. I

The crucial issue here is whether the plaintiffs who stepped into the shoes of Citibank NA by subrogation can

obtain an order for sale under s 256 of the National Land Code 1965. *Hanbury and Maudsley on Modern Equity* (11th Ed) at p 673 states as follows:

Subrogation is a doctrine under which a person is entitled to stand in the shoes of another in respect of certain legal or equitable rights. The most common application is that of a contract of insurance, or a contract of suretyship. An insurer who pays the loss is entitled to stand in the shoes of the insured in respect of his action against the party responsible for the loss. Similarly, a person who pays another's debt may in some circumstances stand in the shoes of the creditor.

On the facts in the present case, I found the plaintiffs had stepped into the shoes of Citibank NA after they had paid off the latter the full sum owed by the defendants which was secured by the said charge. The defendants went on to execute a fresh charge in favour of the plaintiffs which could not, however, be registered. Nevertheless, the charge documents together with the issue document of title and a discharge of charge remained in the possession of the plaintiffs. The plaintiffs have thus become an equitable chargee of the said property. In the words of Salleh Abas CJ (as he then was) in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd*¹ at p 270:

[The] examination of court's decisions clearly shows that the courts have resorted to equitable principles and consistently held that an agreement or an agreement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created. (See *Ngan Khong v Bamah bte Pakeh Jamin & Anor* [1935] FMSLR 81; *Arunasalam Chetty v Teah Ah Poh Trading* [1937] MLJ 17; *Vallipuram Sivaguru v Palaniappa Chetty* [1937] 6 MLJ 59 and *Mercantile Bank v Official Assignee* [1969] 2 MLJ 196.)

With respect to the role of the English equitable rules in land law, the Privy Council decision in *United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi*² seemed to settle the issue once and for all. There, the Board was asked to consider whether the English equitable rules on relief against forfeiture could apply under our Code. The Board concluded that:

the National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it as well as other important matters affecting land and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.

However, per Judith Sihombing in *The Centenary of the Torrens System in Malaysia* (1989) at pp 101-102:

Despite the *UMBC* case there seems to be some confusion remaining as to the role of the equity in Peninsular Malaysian Torrens scheme. On the one hand the Privy Council there was fairly clear that equity should not affect land matters because these were covered by the Code. In *Tan Khien Toong* the majority found no inhibition on equitable estoppel applying (nor indeed did Wan Suleiman SCJ in his dissenting judgment), and nor did the Supreme Court in *Cheo Lean How*. Whilst, on the facts, the estoppel was said not to have been

established in these cases, the fact remains that they seem to contradict the decision in the *UMBC* case. Is it possible that the courts are doing with equitable estoppel the same thing they seem to do with *Hassan's* case and the *jual janji*.

Now, coming back to the crucial issue in the present application, in my judgment, the plaintiffs cannot enforce their right as an equitable chargee to obtain an order for sale under s 256 of the National Land Code 1965 for the following reasons. It must, first and foremost, be recognized that the National Land Code 1965 adheres strictly to the principle of registration and recognizes only parties who are registered under the Code. *Section 242* states that every charge to secure the repayment of debt, or the repayment of any sum other than a debt, shall be effected by an instrument in Form 16A or in the case of acquiring the payment of annuity or other periodic sum it shall be in Form 16B. Secondly, s 243 clearly stipulates that every charge created shall take effect upon registration so as to render the land or lease liable as security. This statutory requirement is enforced under s 218(2) which stipulates that the transfer under the Code of any charge shall be effected by an instrument in Form 14B. Thirdly, the effect of a transfer of a charge by a chargee shall pass to and vest in the transferee upon the registration of the transfer (s 219(1)) and by sub-s 2 the provisions, express or implied, of any transferred lease or charge shall, so long as it continues vested in the transferee, be enforceable by or against him as if he were a party thereto. Thus, from the above sections of the Code it is abundantly clear to all and sundry that the Code recognizes only registered chargees. Hence, before the plaintiffs could invoke their right under s 256 of the National Land Code 1965, they must first be registered chargees by registering either a fresh charge in Form 16A or transferring the said charge in Form 14B from the former chargee, the Citibank NA into their name. Thus, whilst the Federal Court in *Mahadevan*,¹ on the one hand, held that the National Land Code 1965 does not prohibit the creation of equitable charge, the Code being a complete and comprehensive code of law governing land, on the other hand, clearly requires the charge to be registered in its prescribed form before a chargee can enforce his right of foreclosure under the Code.

For the above reasons, I am satisfied the defendants have shown the existence of cause to the contrary within the meaning of s 256(3) of the National Land Code 1965. Accordingly, the plaintiffs' application is disallowed with costs.

Application dismissed.

Solicitors: *Ong & Manecksha; Lim Cheng Poh, Lim & Rahim.*

Reported by Kevin Mathews